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No. _____

In The

Supreme Court of the United States

October Term, 1984

HUGHES-BECHTOL, INCORPORATED,

Petitioner,

vs.

WEST VIRGINIA BOARD OF REGENTS,
A Statutory Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the courts below erred by failing to identify Hughes-Bechtol's contract rights as property protected against deprivation by the states or by one acting under color of state law under the Fifth and Fourteenth Amendments and, by dismissing the suit, effectively denying Hughes-Bechtol constitutionally guaranteed due process of law.

2. Whether the courts below erred in failing to recognize that dismissal of Hughes-Bechtol's breach of contract action and relegation of Hughes-Bechtol to the West Virginia Court of Claims as its exclusive remedy, which is legislative and discretionary in nature, is contrary to the judicial remedy required under the Due Process Clause of the Fifth and Fourteenth Amendments.

3. Whether there exists an identifiable need for the Supreme Court to develop

a national uniform standard for determining when a state agency will be deemed to be a citizen for diversity-of-citizenship jurisdiction purposes under 28 U.S.C. §1332.

4. Whether the Supreme Court should review and reassess present case law regarding the mandatory provisions of the Federal Arbitration Act and determine whether the Act should be found to provide an independent basis for federal court jurisdiction in light of today's methods of financing and constructing state educational institutions.

5. Whether the Board has deprived Hughes-Bechtol of its contract property rights by entering into a construction contract, receiving the benefit of the contract and then denying the obligations of the contract in violation of Hughes-Bechtol's civil rights under 42 U.S.C. §1983.

6. Whether the extreme inequitable nature of this case requires that this Court exercise its supreme judicial power to right obvious wrongs.

PARTIES IN COURT BELOW

Petitioner is Hughes-Bechtol, Incorporated, an Ohio corporation engaged in the construction business.

Respondent is the West Virginia Board of Regents, a statutory corporation which has ownership of state universities of West Virginia. The Board is affiliated with the State of West Virginia.

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OPINIONS BELOW

The opinion of the Court of Appeals, rendered on June 18, 1984, is reported at 737 F.2d 540 (6th Cir., Ohio 1984) and is reproduced in the Appendix at pages 168-185.

The opinion of the District Court of December 4, 1981 granting the Board of Regent's Motion to Dismiss is reported at 527 F. Supp. 1366 (D.C. S.D. Ohio, W. Div., 1981), and is reproduced in the Appendix at pages 67-167.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 18, 1984, and this petition for a writ of certiorari will be filed within 90 days of the entry of that judgment. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

(Pertinent text is set forth App. pp.1-66)

1. Federal Provisions
   (i) United States Constitution
      (a) Amendment V
      (b) Amendment XI
      (c) Amendment XIV
   (ii) United States Code
      (a) Declaratory Judgment Statute 28 U.S.C. §2201
      (b) Federal Question Jurisdiction Statute 28 U.S.C. §1331
      (c) Diversity of Citizenship Statute, 28 U.S.C. §1332
      (d) Civil Action For Deprivation of Rights Statute 42 U.S.C. §1983
      (e) United States Arbitration Act
         9 U.S.C. §1
         9 U.S.C. §2
         9 U.S.C. §4
         9 U.S.C. §9
2. West Virginia Provisions
   (i) West Virginia Constitution Article VI, §35
   (ii) West Virginia Code
      (a) §18-26-3
      (b) §18-12B-1 et seq.
      (c) §18-11E-1 et seq.

STATEMENT OF THE CASE

A. Factual History

Rather than raise capital funds for the remodeling, renovation and new construction of buildings at its Marshall University campus

through the exercise of its sovereign power to tax, the State of West Virginia opted for what has become the more popular method of raising capital, i.e., by authorizing, issuing and selling in interstate commerce non-recourse revenue bonds. On August 1, 1977, therefore, through the West Virginia Board of Regents, a corporation created by the West Virginia legislature, $51,700,000 of State System Tuition Fee revenue bonds, 1977 Series A, were issued.

> "The 1977 Series A Bonds will be issued in the form of coupon bonds, registrable as to principal only, in the denomination of $5,000. Principal and semi-annual interest (April 1 and October 1, first coupon April 1, 1978) payable at the office of the Treasurer of the State of West Virginia, Charleston, West Virginia, or at the option of the holder at the principal office of Citibank, N.A., New York, New York or at the principal office of First National Bank of Chicago, Chicago, Illinois.
>
> "The 1977 Series A Bonds are revenue bonds of the State of West Virginia payable solely from the Revenues pledged therefor and defined herein. The 1977 Series A Bonds shall not be

> deemed to be obligations or debts of the State of West Virginia and the credit or taxing power of the State of West Virginia shall not be pledged therefor." (Emphasis added)
>
> (From the Face Page of the Official Statement, App. p. 258).

Having the funds in hand, the West Virginia Board of Regents (the Respondent in this appeal, hereinafter referred to as the Board) proceeded to advertise in interstate commerce for contractors to perform the scheduled work at the Marshall University campus. Hughes-Bechtol, Inc., an Ohio corporation, and the Petitioner herein (hereinafter referred to as Hughes-Bechtol) responded to the advertisement, bid the mechanical work and was awarded a contract in the amount of THREE MILLION ONE HUNDRED SIXTY-TWO THOUSAND ONE HUNDRED SEVENTY-THREE AND NO/100 DOLLARS ($3,162,173). The contract, which was prepared by the Board, was a compilation of the American Institute of Architects "Standard Form of Agreement Between

Owner and Contractor" showing the Board (not the State of West Virginia) as the owner and Hughes-Bechtol as the contractor and containing the usual and ordinary clauses for dispute resolution by the American Arbitration Association. (App. p. 219). Although the Official Statement as noted above contained a disclaimer of responsibility by the State, the construction contract contained no disclaimer of any type and no notice that any sums awarded through the dispute resolution procedures of the contract would be payable solely as a moral obligation of the State of West Virginia, and then only after a de novo hearing before a "Court of Claims". Hughes-Bechtol notes also that the West Virginia Court of Claims is not judicial but rather legislative in nature and is merely an advisory arm of the Legislature created to review claims asserted against the State or its agencies for consideration by the West Virginia Legislature for payment as an act of

grace and a matter of moral obligation of the State. Relying upon the plain language of the "Standard Form of Agreement Between Owner and Contractor", Hughes-Bechtol proceeded with its work, suffered approximately ONE MILLION AND 00/100 DOLLARS ($1,000,000) of damages over and above the contract price as the result of the failure of the Board to perform its supervisory obligations under the construction contract. As a result of such damages, Hughes-Bechtol sought payment of such additional amounts and, when denied, turned to arbitration as bargained for in its contract.

Thus, on December 11, 1980, Hughes-Bechtol filed a demand for arbitration with the Cincinnati, Ohio office of the American Arbitration Association (AAA). The AAA, recognizing the significance and complexity of the dispute, appointed one of its most experienced panel members as arbitrator, Robert Bruce Shearer, a retired governmental contract expert, national

lecturer on construction contract disputes and a respected attorney.

Arbitrator Shearer bifurcated the arbitration inquiry with consideration being first given by him to whether the issue was one subject to arbitration. On February 20, 1981, the arbitrator ruled that the matter was arbitrable, and notified the parties of his decision. (App. p. 186). A substantive hearing on the claims of Hughes-Bechtol was held and lasted three (3) days. On June 9, 1981, the arbitrator after careful consideration, issued his decision, finding that Hughes-Bechtol was entitled to an additional sum of FIVE HUNDRED TWENTY-ONE THOUSAND THREE HUNDRED TWENTY-SIX AND 48/100 DOLLARS ($521,326.48). (App. p. 189).

While the Board did not participate directly in the arbitration hearings, it did have representatives present during a substantial part of the hearings. However, the Board and the West Virginia Attorney

General's Office advised Hughes-Bechtol and the American Arbitration Association that the Board was not authorized to engage in binding arbitration.

A second arbitration was held on February 28, 1983, and although the Board was properly notified, it refused to make an appearance and participate. The second arbitration concerned further additional costs incurred by Hughes-Bechtol beyond the cut off date of the first arbitration. A panel of three (3) newly appointed arbitrators awarded Hughes-Bechtol an additional THREE HUNDRED NINETY-EIGHT THOUSAND SIX HUNDRED EIGHTY-FIVE AND 85/100 DOLLARS ($398,685.85). (App. p. 194).

Neither award has been paid to date.

B. Procedural History

Hughes-Bechtol, in its District Court Complaint filed on February 9, 1981, alleged that the Board had entered into a construction contract with Hughes-Bechtol dated March 14, 1979 and sought relief on the grounds that the

Board had breached its contract by failing to honor the arbitration clauses which had been placed in the construction contract for the express purpose of resolving disputes when, and if, they arose. Federal jurisdiction was invoked under 28 U.S.C. §§1331(a), 1332 and 2201, and Rule 57 of the Federal Rules of Civil Procedure.

The Board, after being properly served with a copy of the Summons and Complaint, sought an extension of the answer date, and by stipulation, it was granted.

The Board then filed a Motion to Dismiss supported by a single affidavit on April 2, 1981 and urged dismissal of the case on the grounds that (1) the District Court lacked subject matter jurisdiction because the action was barred by the Eleventh Amendment to the United States Constitution, and Article VI, Section 35 of the West Virginia Constitution; (2) there was no diversity of citizenship jurisdiction, nor was there federal question

jurisdiction; (3) there was a lack of personal jurisdiction and insufficient service of process; (4) there was improper venue; (5) there was failure to state a claim; and (6) there was failure to join an indispensible party, the State of West Virginia.

Between the filing of the Board's Motion on April 2, 1981 and the District Court's written decision on the merits, issued on December 4, 1981, Hughes-Bechtol sought to avail itself of a remedy provided in its Standard Form Contract. Specifically, under Article 9.7.1 of the contract (App. p. 251), Hughes-Bechtol could cease work after written notice to the owner until such time as an unpaid arbitration award is paid by a recalcitrant Owner. When the Board both continued to refuse to pay the award and also threatened to reassign Hughes-Bechtol's work to another contractor, Hughes-Bechtol sought injunctive relief to prevent such reassignment. A hearing on the injunction

took place on August 11, 1981 and the injunction was verbally denied by the District Court in telephone conference within days after the hearing.

Hughes-Bechtol also formally requested the right to conduct discovery regarding its case in chief but was denied permission to do so and therefore never was afforded discovery in the case in chief.

On December 4, 1981, the District Court filed its written Decision and Entry confirming its verbal ruling denying an injunction, and rendered a final decision on the Board's Motion to Dismiss. The Board's Motion to Dismiss was granted "because this Court does not have jurisdiction over the subject matter of the present action." (Decision and Entry, App. p. 149). Hughes-Bechtol's motions seeking orders of the Court to compel discovery and expressing a disinclination to sustain Defendant's motion to dismiss, which had been filed with the

District Court while the other motions were pending, were dismissed as being moot.

On December 14, 1981, Hughes-Bechtol filed a motion to alter or amend the judgment and request to admit exhibits into evidence. In its Decision and Entry of February 17, 1982, the District Court also overruled this motion of Hughes-Bechtol. (App. p. 162)

On December 11, 1981, while the District Court proceedings were pending, Hughes-Bechtol, in an attempt to pursue all possible means of legal redress, contemporaneously sought relief based on the same factual allegations by filing a claim in the West Virginia Court of Claims, requesting that the Court of Claims affirm the first arbitration award. Hughes-Bechtol again notes that the Court of Claims is not a judicial court but rather an advisory body to the West Virginia Legislature.

On July 26, 1982, the West Virginia Court of Claims issued its decision, upholding the

arbitration process as the accepted form of dispute resolution, even when a state agency is involved, and awarding Hughes-Bechtol FIVE HUNDRED FORTY-TWO THOUSAND NINE HUNDRED EIGHTY-TWO AND 11/100 DOLLARS ($542,982.11). (App. p. 197). The Court of Claims' award was submitted to the West Virginia Legislature for appropriation of the funds to honor the award. This appropriations procedure is mandated by West Virginia Code Section 14-2-23. In February, 1983, a subcommittee of the West Virginia Senate flatly refused to honor the Court of Claims' award recommendation and returned the matter to the Court of Claims for a full evidentiary de novo hearing. (App. p. 205). To this date such a hearing has not yet been held.

Meanwhile, Hughes-Bechtol had properly taken an appeal under 28 U.S.C. §1291 from the December 4, 1981 decision and entry and the February 17, 1982 decision and entry. The appeal process following the Court of Claims'

favorable decision was stretched out over an extended period of time because of continuances sought in the now obviously vain hope that the parallel process in the West Virginia Court of Claims would resolve the dispute and moot the appeal. After the inordinate delay caused by processing the claim through West Virginia's Court of Claims, and then failing to have the award recommendation acted upon by the West Virginia Legislature, the Sixth Circuit redocketed the appeal and the matter was argued on April 4, 1984.

On June 18, 1984, the Court of Appeals affirmed the District Court's decisions and entries dismissing Hughes-Bechtol's Complaint for lack of jurisdiction. A judgment to that effect was entered on June 19, 1984.

C. The District Court's Decision

The District Court's dismissal of Hughes-Bechtol's action, as outlined in its Decision and Entry of December 4, 1981, was

based on (1) a lack of subject matter jurisdiction and (2) the existence of sovereign immunity. Although conceding that Hughes-Bechtol and the Board were "technically 'residents' of different states and would thus seem to satisfy diversity requirements [under 28 U.S.C. §1332 (1970)]", the District Court found that "the Board is an arm of the State of West Virginia" and therefore the "Board of Regents may not be considered a citizen for the purpose of invoking diversity jurisdiction" as determined by this Court in Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482 (1894). (App. p. 88).

After finding that diversity jurisdiction did not exist, the District Court reviewed the case to determine if federal question jurisdiction existed. The Court found that Hughes-Bechtol's assertion that a federal question had arisen under the Eleventh Amendment was not well taken because the "issue is merely an anticipation of a defense

and does not constitute an element of Hughes-Bechtol's claim, which is for a declaratory judgment and for the enforcement of an arbitration decision. As such, the Eleventh Amendment issue does not invoke this Court's federal question jurisdiction in light of the Supreme Court's ruling in Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974)." (App. pp. 102-103).

The Court also found that the Declaratory Judgment Act, 28 U.S.C. §2201 (1958), did not extend independent jurisdiction to the federal courts, but "is a procedural remedy which can only be afforded where another basis of jurisdiction already exists." (App. p. 104).

Additionally, the Court found that the Federal Arbitration Act, 9 U.S.C. §1 et seq. (1970), specifically "§9 was only intended as a guide to where arbitration should take place when no agreement had been made by the parties, and was not intended as an independent grant of jurisdiction in federal

courts." (App. p. 119). Therefore, "the Court concludes that in actions brought to confirm arbitral (sic) awards under §9 of the Arbitration Act, the same prerequisite, of an independent ground of federal jurisdiction, applies as has been required in actions involving other sections of the Act. Having found no diversity jurisdiction between the parties herein, and no basis for federal jurisdiction other than the United States Arbitration Act, the Court concludes that it does not have subject matter jurisdiction over the present controversy." (App. pp. 119-120).

Although stating that resolution of the jurisdictional issue was dispositive of the case, the District Court proceeded to address the issue of "sovereign immunity."

In addressing this issue, the court assumed that the activities engaged in by the Board in soliciting bids, etc., constituted "interstate commerce" and reviewed the Federal Arbitration Act to determine if Congress had

intended to abrogate a state's sovereign immunity under the Act. Since no express intent to abrogate a state's sovereign immunity was found in the legislative history of the Federal Arbitration Act, the Court concluded that, under Missouri Employees, West Virginia's sovereign immunity remained intact. Finding this conclusion to be dispositive of the issue, the Court did not address the further question of whether the Board has waived its immunity by engaging in extensive interstate commerce after passage of the Act.

The Court concluded by stating that

> "thus, since the Board, as an arm of the State of West Virginia, is immune from suit under both State and federal law, the within action against the Board of Regents is barred. In so holding, the Court notes that the Plaintiff does have a viable remedy against the Board in the West Virginia Court of Claims." (Emphasis added). (App. p. 149).

D. The Court of Appeals' Decision

The Court of Appeals affirmed the District Court's Decision and Entry of December 4, 1981. In its review of the case, the Court of Appeals determined that "the question whether the Board is and was a citizen of West Virginia or an agency or alter-ego of the State for purposes of diversity jurisdiction is purely a question of federal law. . . . In this case, however, we hold that it is governed by the law of West Virginia." (App. p. 177). With this as its premise, and in referring to the District Court's opinion, the Court of Appeals concluded that "the Constitution, statutes, and federal and state case law of West Virginia, as well as the undisputed facts, are dispositive of the status of the Board as an agency and alter-ego of the State, and the absence of diversity jurisdiction in this case". "The District Court had no jurisdiction to determine appellant's rights under 28 U.S.C. §1331(a) involving the

Eleventh Amendment to the Constitution, as this statute does not confer jurisdiction." (App. p. 183).

The Sixth Circuit found that suit in the case was, for all intents and purposes, against the State of West Virginia and, even if consent to suit had been given by West Virginia, it would not suffice to create diversity jurisdiction.

The Sixth Circuit adopted many of the factual findings of the District Court in rendering its opinion. Specifically, the Sixth Circuit thought it important that:

> 12. The other contractors on the Henderson Center project have agreed to pursue remedies for contractual claims against the Board in the West Virginia Court of Claims. (App. pp. 175-176).
>
> 20. The State of West Virginia has authorized suit to be brought against the State in the West Virginia Court of Claims. (App. p. 177).

and so stated that "the state courts of West Virginia that have jurisdiction over the Board can be resorted to by appellant." (Emphasis

added). (App. p. 184). The Court otherwise declined to address the Eleventh Amendment issues raised by appellant.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT PLAINLY ERRED BY FAILING TO EXERCISE FEDERAL QUESTION JURISDICTION PURSUANT TO 28 U.S.C. §1331.

A. The Courts Below Erred By Failing To Protect Hughes-Bechtol's Due Process Rights.

It is the established law in the United States that valid contracts have the status of property for the purpose of guaranty of due process of law and, as such, are protected from being taken without just compensation, whether the obligor is a private individual, a municipality, a state, or the United States. Lynch v. U.S., 292 U.S. 591, 78 L.Ed. 1434, 54 S.Ct. 840 (1934); overruled on other grounds, Thorpe v. Housing Authority of Durham, 393 U.S. 268, 21 L.Ed.2d 747, 89 S.Ct. 518 (1969).

> "The constitutional prohibition against the deprivation of property without due

> process of law reflects the high value, embedded in constitutional and political history, that is placed on a person's right to enjoy what is his, free of governmental interference."

Fuentes v. Shevin, 407 U.S. 69, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972). These pronouncements by this Court are designed to protect that which is guaranteed to every citizen of the United States under the Due Process Clause of the Fifth and Fourteenth Amendments. Corporations are, of course, also fully entitled to the protection of the due process clause in their property or their property rights, Pierce v. Society of Sisters, 268 U.S. 510, 69 L.Ed. 1070, 45 S.Ct. 571 (1925).

As of April 5, 1979, when Hughes-Bechtol signed the construction contract, it acquired valuable and substantial property rights guaranteed to be inviolate by states, or others acting under color of state law, under the Fifth and Fourteenth Amendments. Because of delays in the progress of the construction

project, caused by the Board's failure to provide supervision, Hughes-Bechtol incurred additional expenses found in the two arbitrations to be almost $1,000,000 which under the terms of its contract, it is entitled to recover from the Board. Hughes-Bechtol has tried to recoup these expenses, but has been unable to exercise its contract rights because of the Board's assertion that it is the State of West Virginia, endowed with sovereign immunity.

The deprivation of Hughes-Bechtol's contract property rights by the State of West Virginia is in no wise reasonably based, or otherwise legitimate because the denial of Hughes-Bechtol's contract property rights in no way promotes the morals, health, safety and welfare of the inhabitants of West Virginia. By effectively thwarting Hughes-Bechtol's attempt to exercise these contract rights, the State of West Virginia and the Courts below have acted contrary to the fundamental

principles of liberty and justice by impairing the value of Hughes-Bechtol's contract. In Re Groban, 352 U.S. 330, 1 L.Ed.2d 376, 77 S.Ct. 510 (1957). This Court previously held in Smith v. Texas, 233 U.S. 630, 58 L.Ed. 1129, 34 S.Ct. 681 (1914), that the right to life, liberty, property, and the equal protection of the law are so related that deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. Hughes-Bechtol's business life has been severely threatened. Specifically, the rights acquired in the contract with the Board are being usurped. Hughes-Bechtol has never had, and never will have, a day in a judicial court so as to protect its procedural and substantive due process rights unless this Honorable Court exercises its supreme judicial power to protect Hughes-Bechtol's constitutional rights. For whatever reason, neither of the courts below addressed the "due process" issue. The Courts below both stated

that an adequate remedy to Hughes-Bechtol's contract dispute existed in the West Virginia state court system. Hughes-Bechtol, in point of fact, has no adequate state remedy.

The body by which the Courts below believed Hughes-Bechtol had an adequate remedy is the West Virginia Court of Claims, created as an arm of the West Virginia legislature, whose purpose is to hear claims against the State. Hughes-Bechtol pursued its claim in the West Virginia Court of Claims and received a favorable judgment on July 26, 1982. However, the Court of Claims award - by statute - must go to the West Virginia Legislature for the appropriation of the money necessary to meet the award recommended. This procedure is mandated by West Virginia Code Section 14-2-23. By this circuitous fashion, the award must come from a totally discretionary legislative appropriation involving state revenues. Hughes-Bechtol has maintained continuously that other means of

satisfying the award exist, other than by an appropriation from the Legislature. Specificially, Hughes-Bechtol notes that (1) existing funds in the Construction Fund by which the Henderson Center project was financed could be called upon to pay Hughes-Bechtol's award; (2) the Board has authority pursuant to West Virginia Code Section 18-12B-2, to issue additional revenue bonds to meet existing obligations associated with this construction project; and, (3) the Board may have an insurance policy or performance bond guaranteeing payment to the contractors. This potential surety situation presently cannot be confirmed because the premature dismissal of the case below has precluded discovery which might have unearthed such bond. In the face of all these possible means of satisfying its claim from private funds, Hughes-Bechtol has been told repeatedly that an adequate - and the only- remedy exists in the Court of Claims and the discretion of

the legislature. The West Virginia Legislature denied the Court of Claims' recommendation. Contrary to the beliefs of the Courts below and the representation of West Virginia officials, Hughes-Bechtol is without an adequate remedy in state court.

B. The Legislative Remedy In The Court of Claims Is Constitutionally Insufficent and Fails to Guarantee Due Process of Law

It is clear that Hughes-Bechtol had a valuable property right founded in the Arbitration provisions for dispute resolution in its construction contract and the subsequent authorization to have any Arbitration decision made effective by an appropriate judicial court of record.

The essence of Hughes-Bechtol's due process deprivation is the fact that the only remedy provided under West Virginia law to redress a taking of private property in the context of this case is a legislative and discretionary remedy as opposed to a judicial remedy. Both of the courts below based their

decisions, in part, upon the implicit understanding that the legislative remedy was adequate to satisfy the due process requirements of the Fifth and Fourteenth Amendments. Hughes-Bechtol submits that the lower courts' determination is simply not so constitutionally. The Constitution of the United States, in the opinion of the writer, requires an impartial judicial remedy for the deprivation of an individual's property by a governmental agency. In spite of the opinions of the courts below, it is clear that no such remedy has been found to exist in this case. An extremely important question calling for resolution by this Court is whether a remedy which is exclusively legislative and discretionary will satisfy the demands of due process. The courts below answered this question in the affirmative.

Each year, the method of raising capital by the sale of revenue bonds is increasing in popularity. State agencies are financing

construction projects by this method because of the larger pool of resources it creates. Consequently, there is also an increase in the number of construction contracts between private businesses and governmental agencies. In light of the Eleventh Amendment's prohibition against suing the state, the growing need for the establishment of a judicial remedy to redress the wrongs committed by governmental agencies in these contractual contexts is readily apparent. This Honorable Court is urged to address the issue whether a legislative remedy in a traditional breach of contract setting is constitutionally sufficient and meets the strict standards established by the due process clause whenever the deprivation of private property of governmental agencies occur.

C. The Lower Courts Erred In Failing To Address The Obvious Conflict Between The Fifth, Fourteenth And Eleventh Amendments.

By failing to identify Hughes-Bechtol's property rights and the due process violations, and thus failing to protect such rights, the courts below compounded that error by not addressing the obvious conflict that arose when the the Board moved to dismiss the case based on sovereign immunity accorded the states under the Eleventh Amendment. The Courts below have plainly erred in failing to protect Hughes-Bechtol's property rights by dismissing Hughes-Bechtol's case based on (1) a lack of diversity jurisdiction and (2) sovereign immunity. Both bases for dismissal are interdependent in that they both are dependent on the determination that the Board is the State of West Virginia and both are directed to the establishment of jurisdiction under 28 U.S.C. §1332. The due process issue creates a federal question and establishes jurisdiction under 28 U.S.C. §1331. The Courts below had jurisdiction to hear

Hughes-Bechtol's case on the merits, and failed to exercise that jurisdiction.

The facts of the case clearly presented a conflict between Hughes-Bechtol's due process rights and the Board's "alleged" sovereignty and immunity under the Eleventh Amendment. Thus, the case presents a situation whereby the Fifth, Fourteenth and Eleventh Amendments to the United States Constitution are at loggerheads.

II. THE DECISIONS BELOW DO NOT ACCORD WITH DECISIONS OF THIS COURT AND HIGHLIGHT A CONFLICT AMONG THE CIRCUITS CONCERNING THE STANDARDS FOR DETERMINING WHEN A STATE AGENCY IS A CITIZEN FOR THE PURPOSE OF FEDERAL DIVERSITY JURISDICTION UNDER 28 U.S.C. §1332.

The lower courts, in ignoring existing cases with precedential value to the case sub judice have effectively denied to Hughes-Bechtol its substantive due process rights under the Fifth and Fourteenth Amendments of the United States Constitution and, unjustly deprived Hughes-Bechtol of a property right without just compensation. By

determining that the Board was an agency of the State of West Virginia, and could not be a citizen for the purpose of diversity jurisdiction, the lower courts misapplied a decision of this Court and ignored conflicting decisions of other Circuit Courts which addressed the issues of what factual circumstances will suffice to cause a state agency to become a citizen for the purpose of diversity jurisdiction pursuant to 28 U.S.C. §1332. By totally failing to consider the factors critical to the determination that the Board, although a state agency, is a citizen for diversity jurisdictional purposes under the facts of this case, the lower courts have completely foreclosed Hughes-Bechtol from exercising its due process rights guaranteed under the Constitution.

A. The Courts Below Erred By Finding That The State Of West Virginia Was The Real Party In Interest.

The Courts below found that the Board is an agent of the State of West Virginia and, by

virtue of its agency relationship, shares the State's sovereignty. Furthermore, because of the agency relationship, the courts below determined that the Board is not a citizen for diversity - of - citizenship jurisdictional purposes.

The Sixth Circuit found as compelling authority this Court's decision in State Highway Commission of Wyoming v. Utah Construction Co., 278 U.S. 194, 73 L.Ed. 262, 49 S.Ct. 104, (1929) (Wyoming Highway Commission), wherein this court stated that, if in a suit brought against a state agency, it is the state that is the real party in interest, then no diversity - of - citizenship jurisdiction exists so as to maintain an action in federal court wherein diversity is the only basis for jurisdiction. The Sixth Circuit, in being guided by Wyoming Highway Commission, found that this

> **"Court appeared to premise its determination that the State was the real party in interest on the**

> following factors: (1) the highway commission was merely an arm or alter ego of the state, 'with no funds or ability to respond in damages,' CITATION OMITTED, and (2) neither the Highway Commission nor its members had assumed any direct or personal responsibility by entering into the contract in question. CITATION OMITTED. Significantly, the Court found it unnecessary to consider the effect of the State's grant to the Highway Commission of the power to sue or be sued, or its later withdrawal of that power. CITATION OMITTED. The Court indicated that since the State was not considered to be a citizen for purposes of diversity, '[N]o consent by the State to submit itself to suit could affect the question of diverse citizenship.' CITATION OMITTED. Thus, even should a state consent to suit in federal court, that act itself cannot create diversity jurisdiction."

Hughes-Bechtol respectfully suggests that the Sixth Circuit has plainly erred in applying Wyoming Highway Commission to the facts of the case sub judice.

Wyoming Highway Commission is readily distinguished from this case. In Wyoming Highway Commission, the Utah Construction Company contracted with a state agency that

had no indicia of corporateness, therefore, not even a hint of independence from the State of Wyoming was ever created. Additionally, the contract between the Highway Commission and Utah Construction Company expressly stated that the State of Wyoming would be paying the construction company on the contract and any liquidated damages payable by the contractor would go to the State of Wyoming. It was more than apparent that Utah Construction Company was dealing with the State of Wyoming.

Unlike Wyoming Highway Commission, the facts of this case do involve indicia of corporateness and independence insofar as the Board is concerned. Specifically, West Virginia Code Section 18-26-3 states that

> There is hereby created a state agency to be known as the West Virginia Board of Regents, which shall be a corporation and as such may contract and be contracted with, plead and be impleaded, sue and be sued, and have and use a common seal. (1969, c. 130). (Emphasis added).

In addition to the corporate status of the Board, the Board also has ownership of the state colleges and universities of West Virginia. As owner of Marshall University, the Board drafted and entered into the construction contract.

Further highlighting its independence - the Board was, and is, financially independent of the State of West Virginia insofar as the Henderson Center construction project which involved Hughes-Bechtol is concerned. In 1977, the West Virginia Legislature authorized the Board to issue $51.7 million dollars in revenue bonds in order to raise the money to finance, inter alia, the Henderson Center construction project. The proceeds from the revenue bonds came from a public sale in interstate commerce. Thus, the funds used to finance the Henderson Center project involving Hughes-Bechtol were all derived from private sources. No West Virginia state funds were involved. In fact, West Virginia expressly

denied any pledge of the State's taxing power or debt services to guarantee the bonds. Clearly, these two cases are separate and distinct in their factual patterns, and Wyoming Highway Commission was erroneously extended and adopted as controlling precedent in the case sub judice.

B. The Decisions Of The Courts Below Conflict With Decisions Of Other Circuits Regarding Suits Against State Agencies.

In determining whether or not a state agency is the real party in interest and thus a citizen for the purpose of diversity-of-citizenship jurisdiction, this Court and the Circuit Courts of the federal system have separately endeavored to develop a set of cogent criteria, starting with the basic premise outlined in Wyoming Highway Commission, i.e., if the State is the real party in interest then suit against a state agency cannot be maintained in federal court

on the basis of diversity-of-citizenship jurisdiction. Conversely, if the State is not the real party in interest, then the agency is a citizen for diversity purposes. The decisions of the courts below necessarily hold - albeit improperly - that the State of West Virginia was the real party in interest. The lower courts' determination is plainly erroneous because the fact-specific nature of the case clearly established the Board in its capacity as owner of the revenue bond proceeds and not as an agent of the state, as the real party in interest.

Federal case law reflects a continuing attempt to identify the indicia which are seen as the determinative factors whether a state agency is so closely associated with the State so as to be deemed the State or sufficiently disassociated from the State so as to be deemed an independent body. In making such a determination the following factors have been considered:

(1) WHETHER A LEGISLATIVE PROVISION EXISTS ESTABLISHING THAT THE AGENCY MAY SUE OR BE SUED:

(a) Cases which have determined that this factor is indicative of the agency being a citizen for diversity purposes:

(i) Kirby Lumber Corp. v. Louisiana, 293 F.2d 82 (5th Cir. La., 1961);

(ii) Kansas Turnpike Authority v. Abramson, 275 F.2d 711 (10th Cir. Kan., 1960), cert. den. 363 U.S. 813, 4 L.Ed.2d 1154, 80 S.Ct. 1250;

(iii) Krisel v. Duran, 386 F.2d 179 (2d Cir. N.Y., 1967) cert. den. 390 U.S. 1042, 20 L.Ed.2d 303, 88 S.Ct. 1635;

(iv) Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081 (6th Cir. Tenn., 1978);

(v) Department of Health & Rehabilitative Services v. Davis, 616 F.2d 828 (5th Cir. La., 1980).

(b) Cases which have determined that this factor is not indicative of the agency being a citizen for diversity purposes:

(i) State Highway Com. v. Utah Construction Co., 278 U.S. 194, 73 L.Ed. 262, 49 S.Ct. 104 (1929);

(ii) Broadwater-Missouri Water Users' Assocation v. Montana Power Co., 139 F.2d 998 (9th Cir. Montana, 1944).

(2) WHETHER AN IMPLIED POWER TO SUE OR BE SUED EXISTS:

(a) Absence of express power to sue or be sued is not indicative of agency not being a citizen for diversity purposes:

(i) C.H. Leavell & Co. v. Board of Commissioners, 424 F.2d 764 (5th Cir. La., 1970).

(3) WHETHER LEGISLATIVE PROVISION EXISTS STATING THAT THE AGENCY PERFORMS ESSENTIAL GOVERNMENTAL FUNCTIONS:

(a) Cases which hold that the agency is not a citizen for purposes of diversity jurisdiction:

(i) Fowler v. California Tollbridge Authority, 128 F.2d 549 (9th Cir. Calif. 1942).

(b) Cases indicative that agency is citizen for purposes of diversity jurisdiction:

(i) Gerr v. Emrick, 283 F.2d 293 (3rd Cir. Pa., 1960) cert. den. 365 U.S. 817, 5 L.Ed.2d 695, 81 S.Ct. 698.

(4) WHETHER A LEGISLATIVE PROVISION EXISTS STATING THAT THE AGENCY TAKE PROPERTY IN THE NAME OF THE STATE:

(a) Cases indicative that state is real party in interest.

(i) Fowler, supra

(b) Cases not indicative that state is real party in interest.

(i) Montana Power Co., supra

(5) WHETHER AGENCY HAS POWER TO TAKE PROPERTY IN ITS OWN NAME:

(a) Cases indicative that agency is citizen for diversity purposes because it is real party in interest:

(i) Dept. of Highways v. Morse Bros. & Associates, Inc. 221 F.2d 140 (5th Cir. La., 1954).

(ii) C.H. Leavell & Co., supra.

(iii) Lenoir, supra.

(6) WHETHER THE AGENCY HAS CORPORATE STATUS OR NOT:

(a) Cases indicative that agency is a citizen for diversity purposes:

(i) Morse Bros., supra.

(ii) Kansas Turnpike Authority, supra.

(iii) Lenoir, supra.

(iv) Davis, supra.

(b) Cases indicative that absence of corporate status establishes agency as not being a citizen for diversity purposes:

(i) Krisel, supra.

(ii) State Highway Commission v. Kansas City Bridge Co. 81 F.2d

689, (8th Cir. Ark., 1936) cert. den. 298 US 661, 80 L Ed 1386, 56 S. Ct. 682.

(7) WHETHER THE AGENCY IS FINANCIALLY DEPENDENT ON THE STATE:

(a) Cases indicative that financial dependency of agency establishes agency as arm or alter-ego of state and thus is not a citizen for diversity purposes:

(i) Utah Constr. Co., supra.

(ii) Blease v. Safety Transit Co., 50 F.2d 852 (2d Cir. South Carolina, 1931).

(iii) Dacey v. Florida Bar, Inc., 414 F2d 195 (5th Cir. Fla., 1969) cert. den. 397 U.S. 909,25 L.Ed. 2d 89, 90 S. Ct. 906.

(iv) Hertz v. Knudson, 6 F2d 812 (8th Cir. Minn. 1925).

(v) Kansas City Bridge Co., supra.

(vi) North Dakota v. National Mill & Cereal Co., 114 F.2d 777 (8th Cir. ND, 1940).

(vii) Fowler, supra.

(viii) Ronwin v. Shapiro, 657 F.2d 1071 (9th Cir. Arizona, 1981).

(b) Cases holding that the absence of financial dependency on the state is indicative that agency is citizen for diversity purposes.

(i) Missouri, K & T.R. Co. v. Missouri R & Warehouse Comrs., 183 U.S. 53, 46 L.Ed 78, 22 S.Ct. 18 (1901).

(ii) Blease, supra.

(iii) Kansas Turnpike Authority, supra.

(8) WHETHER STATE COURT DECISIONS HAVE FOUND AGENCY TO BE INDEPENDENT OF STATE OR NOT:

(a) cases which determine that agency is separate:

(i) Gerr v. Emrick, supra.

(ii) Kirby Lumber Corp., supra.

(iii) Montana Power Co., supra.

It is patently obvious that the presence or absence of one or more of the above factors has been determinative of whether or not a state agency will be deemed to be a citizen for the purpose of diversity jurisdiction. This ad hoc application of these factors in trying to determine who is the real party in interest has created inconsistency in litigation at the federal level whenever a

state agency is involved. This inconsistency exists because of the absence of a definite statement from this Court establishing guidelines to determine when a state agency becomes sufficiently independent of the state so as to become a citizen for diversity purposes and can be subjected to suit in federal court pursuant to 28 U.S.C. §1332.

Presently, one does not know whether the above-referenced eight factors, in and of themselves, are the only factors which are determinative of citizenship status for a state agency. Nor could a potential litigant state with assurance that if, for example, four out of the eight factors existed in a particular case, his action would be maintainable in federal court, assuming the other prerequisites to the establishment of diversity jurisdiction exist.

Neither do the cases reflect a clear trend as to whether the test for determining the real party in interest is to be "factual"

in nature, and thus objective, or whether there is to be a "balancing" of the above-referenced factors, making the test more subjective in nature, and subject to considerable judicial discretion. Hughes-Bechtol suggests it is time that this Court establish guidelines to remove the real probability that, for example, a state agency in one of the core of states comprising the Ninth Circuit would not be a citizen for diversity purposes and not subject to suit in federal court, yet a parallel state agency in one of the states comprising the Fifth Circuit, faced with the same set of facts and circumstances, would be a citizen for diversity purposes and subject to suit in federal court. This Court is urged to address the "real party in interest" issue as it impacts on state agencies and 28 U.S.C. §1332, so as to preclude future situations not unlike the case sub judice wherein Hughes-Bechtol's

substantive due process and civil rights are being violated.

Hughes-Bechtol would point out that neither the District Court nor the Court of Appeals engaged in any factual analysis consistent with other circuit court decisions, but merely accepted the assertion of the Board that it was a state agency, and, as a matter of law, the state for diversity purposes. There is no doubt that had a fact sensitive analysis been undertaken - after due discovery, which was not permitted herein - sufficient indicia of independence would have been evidenced to support diversity jurisdiction. This implicit conflict between circuits clearly calls for the exercise of the review powers of this Honorable Supreme Court.

III. THE COURTS BELOW ERRED IN APPLYING THE FEDERAL ARBITRATION ACT.

A. The Courts Below Failed To Give Proper Weight To The Impact Of The Federal Arbitration Act Upon The Eleventh Amendment Defense Of State Immunity And Of The

Fact That It Was The U.S. Treasury And Not The West Virginia Treasury Which Supported The Sale Of Bonds.

But for the assertion that the Board enjoyed the same status of immunity as the State of West Virginia itself, diversity jurisdiction between the Ohio corporation, Hughes-Bechtol, and the West Virginia corporation, the Board of Regents, was proper. In other words, all of the elements required by 28 U.S.C. 1332 were present: corporate residence in separate states, an appropriate jurisdictional amount and sufficient contacts with the State of Ohio on which to base venue in the District Court at Dayton, Ohio. Thus, a separate ground for jurisdiction apart from any jurisdiction granted by the Federal Arbitration Act, existed. Such jurisdiction was divested however, by the Board's invoking the constitutional prohibition of the Eleventh Amendment. The Board had taken full advantage of the benefits bestowed upon it pursuant to

the commerce clause of the United States Constitution both in the sale of bonds to establish a construction fund, the solicitation of and contracting with multi-state contractors and, perhaps as significant as any other factor, availing itself of the advantage of tax exempt securities to achieve a favorable input of foreign interstate capital. With respect to this latter factor, Hughes-Bechtol would urge this Court to consider the fact that it is the people of the United States, not the people of West Virginia, who are supporting through their taxing power, the construction of the Marshall University buildings; i.e. the amount of money represented by the tax free payments of interest on the bonds sold in interstate commerce deprives the Treasury of the United States. The people of the United States having subsidized the erection of the buildings at Marshall University by tax exemption and having provided by their

securities laws for the marketing in interstate commerce of the underlying bonds have a right to expect that their substantive laws will have primacy over mere labels placed upon state agencies the result of which is to divest the Federal Court's jurisdiction and to emasculate the Federal Arbitration Act. Hughes-Bechtol notes in this context that the Board held out arbitration, and the Federal Arbitration Act by implication, as an inducement to Hughes-Bechtol to enter into its interstate contract. Hughes-Bechtol respectfully submits that the Court of Appeals in this case has decided an important question of federal law, namely whether the Federal Arbitration Act confers an implicit consent to federal suit by a state agency whose only defense is an Eleventh Amendment divestiture of otherwise appropriate Federal Court jurisdiction. This question has not been, but should be, settled by this Court.

B. <u>There Were Several Independent Bases</u>

For Jurisdiction To Support The Federal Arbitration Act, 9 U.S.C. §1 et seq., And The Declaratory Judgment Statute, 28 U.S.C. §2201

The deprivation of Hughes-Bechtol's property gave rise to a due process issue which created the basis for federal question jurisdiction under 28 U.S.C. §1331. In light of the District Court's thorough analysis of the Federal Arbitration Act, and the Declaratory Judgment statute, and the Court's determination that an independent basis for jurisdiction need exist, Hughes-Bechtol respectfully states that the due process issue provides that independent basis for jurisdiction.

Additionally, the conflict between the Fifth, Eleventh and Fourteenth Amendments to the United States Constitution created another federal question basis for jurisdiction and an independent source of support for the Federal Arbitration Act and the Declaratory Judgment statute. However, the Courts below failed to

recognize Hughes-Bechtol's due process problem, and therefore, indirectly assisted in depriving Hughes-Bechtol of its property without just compensation.

IV. IN PREMATURELY DISMISSING PETITIONER'S CASE, THE COURTS BELOW HAVE ALLOWED A CONTINUING FRAUD THAT HAS CAUSED THE DEPRIVATION OF PETITIONER'S PROPERTY RIGHTS IN VIOLATION OF DUE PROCESS OF LAW AND MISAPPLIED THE DECISION OF THIS COURT IN SCHEUER V. RHODES, 432 U.S. 232, 40 L.Ed.2d. 90, 94 S.Ct. 1683 (1974).

Historically, states have been afforded the protection of sovereign immunity. The courts below found that the Board, as an agency of the State of West Virginia, was, in effect, sovereign. As such, the Board enjoys the sovereign immunity of the Eleventh Amendment and Article VI, Section 35 of the West Virginia State Constitution.

It has long been the rule of this Court that:

> "Although a state may not be sued without its consent, such immunity is a privilege which may be waived." Clark v. Barnard, 108 U.S. 436, 774, 27 L.Ed. 780, 784, 2 S.Ct. 878 (1882).

Consential waiver of the state's sovereign immunity has often come by way of voluntary submission to a court's jurisdiction. Clark, supra; Reagan v. Farmers Loan & Trust Co., 154 U.S. 362 (1893); and Gunter v. Atlantic Coast Line Railroad Company, 200 U.S. 477 (1906). However, any express manifestation of the intent to discard this privilege is consistent with the concept of "waiver". In the case at bar, the State of West Virginia, by statute, has expressly discarded the Board's sovereign immunity privilege.

It is a well-established principle that, unless prohibited by an immunity doctrine, precluding a suit against a governmental entity for mispresentations by its officials or employees, a public authority may be held liable, to the same extent as a private

individual or firm, for the concealment of undisclosed facts known by it, where the public entity makes positive misrepresentations directly concerning the matters to which the undisclosed facts relate. Christie v. United States, 237 U.S. 234, 59 L.Ed. 933, 35 S.Ct. 565 (1915); Aerodex, Inc. v. United States, 189 Ct. Cl. 344, 417 F.2d 1361 (1969); United States v. Beuttas, 324 U.S. 768, 89 L.Ed. 1354, 65 S.Ct. 1000 (1945).

Before causing the construction contract to be signed on its behalf, the Board - in accordance with West Virginia law - had the contract reviewed and approved by the Commissioner of West Virginia Department of Finance & Administration; the contract was reviewed and "approved" by the Director, Purchasing Division, as to "provisions and terms"; and, the contract was "approved as to form" by the West Virginia Attorney General's Office. After Hughes-Bechtol's had done the work and attempted to exercise its contract

rights, it was informed by the Board that the Board had made a mistake in including in the contract the very arbitration provision Hughes-Bechtol was relying upon. The Board repudiated the contract. The West Virginia Attorney General stated, on behalf of the Board, that the Board was constitutionally precluded from engaging in binding arbitration or submitting itself to suit, citing Article VI, Section 35 of the West Virginia Constitution as authority; and, that any provision that attempted to bind the Board contractually was void as a matter of law.

The Board has received the complete benefit of the bargain and has been enjoying the use of the facilities worked on by Hughes-Bechtol for approximately two years. Hughes-Bechtol is still without complete relief under the contract. The Board, through its personnel, misrepresented to Hughes-Bechtol the extent of its authority to engage in a binding contractual arrangement.

Because the Board failed to state this "non-binding" point but in actuality held itself out as being an independent corporate body with authority to solicit bids, negotiate the terms and draft the contract, this omission of a fact material to the contractual agreement of the parties has mislead Hughes-Bechtol to its financial detriment. The impairment of the value of the contract, based on the misrepresentation of state officers clearly establishes the basis for a civil rights cause of action under 42 U.S.C. §1983 against these state officers.

The Courts below, by failing to follow the dictates of Scheuer v. Rhodes, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974) have deprived Hughes-Bechtol of its 1983 cause of action. This Court said in Scheuer:

> Under 42 USCS §1983, [which provides] a civil action for violation of federal rights by state officials under color of state law, the acts of a. . .high executive officer do not have the quality of a supreme and unchangeable edict,

> overruling all conflicting rights of property; these acts are reviewable through the judicial power of the federal government.

Hughes-Bechtol's third claim for relief was based on an allegation of "fraud in the inducement." Hughes-Bechtol sued nominally the West Virginia Board of Regents because the contract was with the Board. Hughes-Bechtol believed that, through discovery, the state officials who effected the fraud would be identified and an amended complaint would be filed with the District Court, naming the perpetrators. It is a matter of basic corporation law that a corporation acts through its agents. Hughes-Bechtol's allegations of misrepresentation and fraud were based on representations, or omissions, made to Hughes-Bechtol regarding facts material to the construction contract by agents and/or representives of the Board in their official capacity.

This Court said in Scheuer, supra, that

> "through the civil rights statutes, Congress intended to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it."

If the Board is a state agency, and through its personnel has induced Hughes-Bechtol to contract with it, and then has denied the contract obligations after having reaped the benefits thereof, there can be no more blatant a violation of Hughes-Bechtol's civil rights.

Under Scheuer, supra and Wood v. Strickland, 420 U.S. 308, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975), this court held that executive immunity is not absolute, in nature, but qualified. "It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under the statute." [42 USCS §1983]. Scheuer, 416 U.S. at 243.

At a minimum, the facts of the case sub judice establish the basis for a cause of action under 42 U.S.C. §1983.

Under Wood, 420 U.S. at 321-323, this court stated that

> While on the basis of common-law tradition and public policy, school officials are entitled to a qualified good faith immunity from liability for damages under the Civil Rights Act, they are not immune from such liability if they knew or reasonably should have known that the action they took within their sphere of official responsibility would violate the constitutional rights. . . if they took the action with malicious intent to cause a deprivation of such rights or other injury. . .[and] a compensatory award is appropriate only if the officials acted with such an impermissible motivation or with such disregard of clearly established constitutional rights that their action could not reasonably be characterized as in good faith. 42 U.S.C.A. §1983. (Emphasis added).

Although respondents in Wood were students, there is no apparent reason why this Court's standard for a qualified executive immunity available to the superintendent of a

school district would not also be applicable to a regent of a college or university, or agent thereof, when that party acts in his official capacity to the detriment of others.

A qualified immunity that would inure to the benefit of a regent under Wood, supra, and Scheuer, supra, is in stark contrast to the immunity which the Board and its agents claim, and that immunity which was recognized by the Courts below, which is absolute in nature. In adopting Kondos v. West Virginia Board of Regents, 318 F. Supp. 394 (S.D. W.Va. 1970), aff'd, 441 F.2d 1172 (4th Cir. 1971), the courts below concurred in the finding that "since the State's immunity is absolute [it] cannot be waived by the state legislature or by any other state instrumentality." (Emphasis added). The inconsistent application of Scheuer and Wood, vis-a-vis Kondos, in the case below draws into question the Supremacy Clause of the United States Constitution.

Under Article VI, Cl. 2 of the United States Constitution, it is said that

> "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

It has long been this Court's position that "a rule stated in a decision of the United States Supreme Court and based upon the Federal Constitution is, under the Supremacy Clause of the Constitution, binding upon state courts as well as upon federal courts." 20 Am.Jur.2d Courts §226. While every word of a state constitution should be given its appropriate meaning and effect, however, sometime the meaning and effect of words in a state constitution may be restrained or modified by applicable controlling commands or limitations contained in the Federal Constitution. 94 ALR 804. Hughes-Bechtol is

well aware of the fact that the exercise of federal supremacy is not lightly presumed. However, the courts below have failed to follow the supreme proposition that inconsistent state laws must give way to federal law. The inequitable nature of the case sub judice, and the apparent conflict between the Supreme Court's "qualified executive immunity" and the State Court's "absolute executive immunity", which the courts below opted to follow as controlling law, must be resolved so that Hughes-Bechtol's civil rights, pursuant to 42 U.S.C. §1983, may be safeguarded. The nature of this case and the regulated subject matter permits of no other conclusion consistent with the Congressional intent behind §1983.

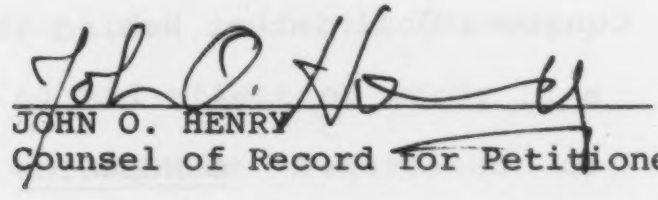
CONCLUSION

Every contract has an implied covenant of good faith. Since Hughes-Bechtol's first attempt at exercising its contract property

rights back in 1979, there has been a total lack of good faith on the part of the West Virginia Board of Regents. This Honorable Court is the court of last resort, and the only body capable of setting right the injustices herein. If Hughes-Bechtol's Fifth and Fourteenth Amendments' Due Process Rights are to be protected, as well as its civil rights under 42 U.S.C. §1983 and if the Federal Arbitration Act is not to be emasculated, this Court must grant its writ of certioriari.

For these reasons, a writ of certiorari should issue to review the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,



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